In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
Petitioner,

vs.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

BRIEF OF ROBERT L. ROPER, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL QUESTIONS PRESENTED

1. As to defendant's Questions Presented I-II: Whether the defendant's deliberate conduct designed to avoid review of the claim for class-wide relief precludes it from pointing to the absence of intervenors as the basis for an alleged mootness.

2. As to defendant's Questions Presented I-II: Whether plaintiffs have a personal stake in the controversy by reason of the prospect of spreading expenses of litigation among more claimants.

3. As to defendant's Questions Presented I-II: Whether certiorari should be granted to review dicta as to the duty of a named plaintiff after an adverse ruling on the certification claim where the rejection by the Court of the dicta could not affect the result in the case at bar.

SUPPLEMENT TO STATEMENT OF THE CASE

The record clearly reflects that the District Court's judgment was entered over the objection of the plaintiffs. The defendant's insinuation that the objection was interposed by counsel acting independently of the plaintiffs is without foundation in the record or basis in fact.

The plaintiffs contended below that their stake in the appeal as named plaintiffs included the prospect of spreading the very extensive, generally non-taxable, out-of-pocket expenses among more claimants, thus reducing substantially the financial burden incurred by them in conducting the litigation in the District Court. Plaintiffs also referred below to the prospect of risk of loss of personal respect and credibility as a result of having offered their names as class champions to a cause which could not end in a payoff to the named plaintiffs alone without some stigma on them as poor stewards over the rights of the class. The defendant made no argument below concerning the technical sufficiency of the phraseology of the notice of appeal.

No intervenors have appeared but defendant has never challenged the correctness of a statement made by plaintiffs in the Court of Appeals to the effect that an intervenor would not make this controversy any more live than it already is because of the likelihood that the defendant would resort to the technical expedient of voluntarily paying into court the amount claimed by each such intervenor piecemeal in order to escape review of the merits of the class action determination. Also, and most significantly, the record reflects that after defendant offered judgment to the named plaintiffs, the named plaintiffs made a counter-offer of judgment on terms which would have expressly recognized the right of review on behalf of the class. Defendant rejected this offer and is now in no position to imply that it would have proceeded directly to a review of the denial of certification had an intervenor only appeared.

ARGUMENT

While defendant laments the multiplicity of class actions, the Fifth Circuit correctly noted that if it were so easy to end class actions by permitting a defendant to pay off the named plaintiffs, through coercion or otherwise, few class actions would survive. See App. F., p. A 36, Petition.

The Seventh Circuit case of *Winokur* v. *Bell Federal Savings and Loan Ass'n*, 560 F. 2d 271 (7th Cir. 1977), reh. den. *en banc*, 562 F. 2d 1034, cert. den., 98 S. Ct. 1507 (1978), relied upon by defendant as the basis for a contention of conflict within the circuits, is distinguishable. In *Winokur*, the plaintiffs' individual claims were moot, no intervenors had appeared and, *unlike the instant case, nothing in the Winokur record clearly showed that the defendants would have resisted review of the certification question even if intervenors had appeared.*

The defendant bank, nonetheless, places much emphasis on the absence of intervenors, as well it should, because this Court has recognized the right of an intervenor to pick up the class standard and prosecute a review of an adverse certification ruling. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). However, implicit in defendant's argument as to the lack of intervenors is the presumption that, had an intervenor appeared, the defendant would have moved quietly on to a review of the certification ruling on its merits. Defendant's own conduct affirmatively shows that it is not entitled to any such presumption. In this case, as already noted, when the defendant served the plaintiffs

with its offer of judgment, plaintiffs made a counter-offer of judgment which, if it had been accepted by the defendant, would have expressly preserved the question of certification of the class for review in the Court of Appeals. The defendant flatly rejected this counter-offer of judgment. Therefore, the Fifth Circuit s observation that intervenors offer inadequate protection because of the possibility that defendant will pay a satisfactory price for their abandoning the appeal is based on ample evidence of an intent by the defendant to do all that is necessary to avoid class-wide review. Under this state of the record, the defendant is precluded from bemoaning the absence of intervenors and this case therefore is just as live a controversy as it would have been had intervenors appeared under the teaching of *United Airlines, Inc* v. *McDonald.*

Defendant announced reliance upon *Winokur* prior to the oral argument in the Fifth Circuit. Copies of all of the proceedings in this Court in *Winokur* were delivered by the plaintiffs to the Fifth Circuit panel at the time of oral argument. A study of the *Winokur* pleadings which were filed in this Court gives the clear impression that the defendant ought not draw comfort from this Court's denial of certiorari in *Winokur*. For example, the "Additional Questions Presented" portion of the Brief in Opposition to the Petition, filed by the Respondent in *Winokur*, discloses the presence of substantial "non-merits" grounds for denial of the writ by this Court. These points included:

(1) A contention that a substantial objection to the opinion below was only dicta that could not affect the result;

(2) A contention that the plaintiffs' mootness question was expressly waived by the plaintiffs in the District Court, and that such waiver was expressly relied upon by the District Court in deciding the case;

(3) A contention that the mootness question was not briefed in the Court of Appeals prior to decision and only presented for the first time in a petition for rehearing in the Court of Appeals over defendant's objection that it had been waived;

(4) A contention that the plaintiff had earlier taken the opposite position in a prior petition for certiorari in the same case;

(5) A suggestion of disqualification of the named plaintiffs as adequate representatives of the class by reason of the close relationship between the named plaintiffs and the attorney who would represent the class.

The absence of intervenors is not fatal to plaintiffs' position in any event by reason of the personal stake in the controversy that the named plaintiffs have by reason of their prospect for the spreading of expenses on a class-wide basis if class-wide relief is allowed. Substantial expenses have been incurred in the proceeding thus far by the named plaintiffs as class champions and such expenses may well exceed the full amount of the individual claim of each plaintiff. The prospect therefore for spreading these expenses among a large group of people is certainly far beyond the level of *de minimis* and is a personal stake in the controversy which entitles these plaintiffs to proceed on behalf of the class to an adjudication of the certification question. Finally, there is an intangible personal stake in the hands of the named plaintiffs by reason of their having lent their names as class champions to a cause which they have a right to see brought to a more savory conclusion than a coerced payoff.

While defendant takes sharp issue with the Court of Appeals' conclusion that there exists a duty on the part of a class champion to seek appellate review of a refusal

to certify the class question, the record in this case shows that the named plaintiffs have prosecuted the appeal. It matters not whether they did so out of right or out of duty. Consequently, the dicta of the Court of Appeals on this issue does not merit the granting of the petition for writ of certiorari because it could not affect the result in the case at bar.

CONCLUSION

The instant case is clearly distinguishable from *Winokur*, and the named plaintiffs here clearly retain a personal financial stake in undertaking the appeal to the Fifth Circuit. The decision of that court is consistent with the decisions of the Supreme Court, particularly *United Airlines* v. *McDonald, supra.* For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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